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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES J. CONNOR, ET AL., PETITIONERS

v.

AEROVOX, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, permit the maintenance of a federal maritime tort damages action alleging the creation of a public nuisance through pollution discharges into navigable waters.

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The brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, who are individual commercial fishermen and a fishermen's association, brought this action in the United States District Court for the District of Massachusetts seeking damages for loss of profits caused by water pollution. The jurisdiction of the district court was invoked under 28 U.S.C. 1333. Petitioners alleged that respondents discharged toxic chemicals, including polychlorinated biphenyls (PCBs) into the Acushnet River, New Bedford Harbor and Buzzards Bay. These waters were closed to commercial fishing as a result of the discharges, which forced petitioners to fish further out at sea, allegedly at

increased cost and hazard. Petitioners claimed that maritime tort law gave them a right to sue for damages for the loss of business profits caused by the change in fishing grounds. See Pet. 11.

2. The district court dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App. A1-A2). Citing *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *City of Milwaukee* v. *Illinois (Milwaukee II)*, 451 U.S. 304 (1981), the court found that this Court had ruled that the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. 1401 *et seq.* preempted the federal common law of nuisance in water pollution cases. The district court concluded that there was "no perceptible reason to distinguish between common law claims and maritime torts in construing the 'all-encompassing' and preemptive effect of the statutes" (Pet. App. A2 (quoting *Milwaukee II*, 451 U.S. at 318)).

3. The court of appeals affirmed (Pet. App. A3-A32). The court of appeals characterized the issue before it as the "narrow" one of "whether maritime law is preempted by enactment of the FWPCA and MPRSA to the extent that it would afford a damage remedy for pollution of navigable waters based on a common-law nuisance theory" (Pet. App. A6). The court noted that *Sea Clammers* involved "a factual setting quite like that of the present case" (*id.* at A9-A10) and that the Court there made clear its view that the statutory preemption of the general federal common law of nuisance in the area of water pollution was not limited to establishment of effluent standards, but included the preemption of claims for damages. In addition, the Court in *Sea Clammers* held that preemption applied to waters regulated under both the FWPCA and the MPRSA. *Id.* at A9-A12.

The court of appeals stated that it was uncertain whether *Sea Clammers* had actually decided that damages were unavailable under a *maritime* law nuisance theory,[1] but it noted that maritime and general federal common law nuisance claims were "virtually coextensive" (Pet. App. A17). In any event, the court concluded that the basis for the decision in *Sea Clammers* regarding preemption of federal common law nuisance claims — Congress's occupation of the field of water pollution abatement in the FWPCA and the MPRSA — was equally applicable to preemption of nuisance claims brought under the judge-made maritime law (*id.* at A18-A24). Accordingly, the court of appeals concluded that claims for damages under a nuisance theory for water pollution, whether based on the general federal common law or on admiralty and maritime law, have been preempted by the enactment of the FWPCA and the MPRSA.

DISCUSSION

The court of appeals' decision that petitioners cannot maintain a maritime tort damages action under a nuisance theory is fully in accord with this Court's decisions in *Sea Clammers* and *Milwaukee II* and with the relevant decisions of other courts of appeals.[2] Accordingly, there is no reason for further review by this Court.

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[1]In *Sea Clammers*, the court of appeals found that the plaintiffs' pleading of an action under the federal common law of nuisance was sufficient also to state a valid nuisance claim under maritime law. *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1233-1236 (3d Cir. 1980), rev'd, 453 U.S. 1 (1981). The specific questions identified by the Court in its grant of certiorari, however, did not explicitly refer to a maritime law claim, although they can fairly be read to encompass one. See 449 U.S. 917 (1980). Thus, while it seems apparent that the plaintiffs' maritime claim did not survive this Court's decision in *Sea Clammers*, the Court did not expressly address the general validity of such a claim. See generally Pet. App. A13-A17.

[2]The United States filed a brief as amicus curiae in support of petitioners in the court of appeals, arguing against the proposition that *all*

As the court below noted (Pet. App. A9-A10), petitioners' claim in this case is quite similar to that of the plaintiffs in *Sea Clammers*. In both cases, fishermen sought damages for economic harm to their businesses caused by discharges of pollutants into navigable waters and the resulting adverse effect on fisheries. *Sea Clammers* clearly holds that federal statutes have preempted the federal common law of nuisance as a basis for such a suit. We agree with the court of appeals that the principles and reasoning of *Sea Clammers* compel the conclusion that a nuisance claim labelled as a maritime tort invoking admiralty jurisdiction, 28 U.S.C. 1333, is similarly preempted, irrespective of whether *Sea Clammers* rejected such a claim as part of its holding.

It is well established that judicially-created maritime law may be preempted when a federal statute "speak[s] directly to" the concerns addressed by the judically-created rule. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Thus, although judge-made law is traditionally a more important component of maritime law than it is of other bodies of federal law (see *ibid.*; *Edmonds* v. *Compagnie General Transatlantique*, 443 U.S. 256, 259 (1979)),

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maritime tort claims have been preempted by the FWPCA and the MPRSA. The government contended that traditional maritime tort remedies for damage to privately or publicly owned property, such as negligence or intentional tort, were not affected by the enactment of those statutes, and our brief relied heavily on the special savings clause of the FWPCA relating to property damage, 33 U.S.C. 1321(*o*)(1). The litigation by the parties in the court of appeals, however, focused solely on the narrower question of the availability of a maritime nuisance damages remedy. Unlike the district court's opinion, which was somewhat cryptic, the court of appeals expressly stated that it was not considering the question of the availability of a maritime damages remedy based on a theory other than nuisance (Pet. App. A28-A29 n.6). As explained *infra*, we believe that, in light of this Court's precedents, the court of appeals correctly resolved the narrower issue on which it ruled — the statutory preemption of a nuisance action under maritime law.

the Court has frequently found judge-made admiralty rules to be preempted by statute. See, *e.g.*, *Mobil Oil Co.* v. *Higginbotham, supra; Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779 (1952). Here, the Court has already concluded that the relevant statutes speak directly to the conduct that underlies this lawsuit — the discharge of pollutants into navigable waters — in a way that leaves no room for the operation of judge-made nuisance law. The FWPCA establishes a "comprehensive" scheme for the regulation of discharges into navigable waters, which this Court has characterized as "occup[ying] the field." *Milwaukee II,* 451 U.S. at 317. The Court found that the existence of a separate body of federal common law of nuisance applicable to such discharges is incompatible with the statutory scheme and hence that that law must be preempted. *Id.* at 325-328. And in *Sea Clammers,* the Court made clear that the preemptive effect of the federal statute was no less when the nuisance claim involved pollution of coastal waters or ocean waters regulated by the MPRSA. 453 U.S. at 21-22. There is no reason to suppose that preemption is any less appropriate when the nuisance claim is predicated on maritime law.

Petitioners offer no convincing basis for drawing a distinction between the federal common law of nuisance claim held preempted in *Sea Clammers* and the maritime nuisance claim here.[3] A damages claim based on a theory of public nuisance is not a traditional maritime remedy;

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[3]Part of the petition is directed at policy considerations that suggest that *Sea Clammers* was wrongly decided (see Pet. 21-26). Alternatively, petitioners suggest at one point (Pet. 22-23) that *Sea Clammers* stands only for the proposition that a valid FWPCA permit insulates a discharger from *criminal* liability and has no effect on civil damages liability. This suggestion is without foundation. Nothing in the facts or opinion in *Sea Clammers* relates to possible criminal liability. The claim there, as here, was for civil damages based on loss of profits caused by damage to fisheries, and that claim was rejected by the Court.

rather, like the federal common law of nuisance, it seems to have originated in this Court's decision in *Illinois* v. *City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972).[4] Neither petitioners (see Pet. 27) nor the courts of appeals that have discussed the issue (see Pet. App. A13; *Sea Clammers,* 616 F.2d at 1235; *In re Oswego Barge Corp.,* 664 F.2d 327, 343 (2d Cir. 1981)) can point to any decision prior to 1973 that recognized a federal maritime tort of nuisance. Thus, the maritime nuisance claim in this case seems indistinguishable from the federal common law of nuisance claim recognized in *Milwaukee I,* and the reasons that required finding preemption of the latter claim in *Milwaukee II* and *Sea Clammers* are equally applicable here.[5] And because the breadth of admiralty jurisdiction (see *Foremost Insurance Co.* v. *Richardson,* 457 U.S. 668, 672-677 (1982)) makes the availability of a maritime nuisance claim almost "coextensive" with the preempted federal common law of nuisance (see Pet. App. A17), acceptance of petitioners'

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[4]As noted above (note 1, *supra*), the court of appeals in *Sea Clammers* held that the plaintiffs there were entitled to pursue a maritime nuisance claim. In fact, they had not specifically pleaded such a cause of action; the court of appeals ruled that the claim was sufficiently pleaded by stating a cause of action under the federal common law of nuisance and that the legal standards applicable to such a claim were probably the same as for the nuisance claim recognized in *Milwaukee I.* See *National Sea Clammers Ass'n* v. *City of New York,* 616 F.2d at 1236.

[5]It may be that because of the traditional prominent role of judge-made law in admiralty, preemption should not be found as readily as it would be with other forms of federal common law. See *In re Oswego Barge Corp.,* 664 F.2d at 335-339. Such a rule should have little application here, however, where the maritime claim is not a traditional one, but rather is of such "recent vintage" (*id.* at 343) that it did not even exist at the time the preempting statutes were enacted. In any event, the comprehensive nature of the regulation of discharges by the FWPCA and the MPRSA found by ~~that~~ this Court in *Milwaukee II* and *Sea Clammers* is more than sufficient to require preemption under any standard.

distinction would seriously undermine the practical effect of the preemption holdings of *Milwaukee II* and *Sea Clammers*.

Petitioners point to no conflict in the lower courts on this issue. One other court of appeals has considered the availability of a maritime nuisance damages remedy, and in a detailed opinion it concluded that such a remedy was preempted by the FWPCA. *In re Oswego Barge Corp.*, 664 F.2d at 343. In short, the decision below is correct, and there is no reason for further review by this Court.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]While we agree with the court below that *Sea Clammers* leaves no room for a maritime damages remedy based on nuisance, we do not agree with petitioners' suggestions (Pet. 16, 17, 22) that the decision below has eliminated all maritime tort claims for damage caused by pollution discharges. As we argued in our brief in the court of appeals, we believe that the FWPCA and the MPRSA do not preempt maritime tort claims — based on a theory other than nuisance — for damage to publicly or privately owned property. See 33 U.S.C. 1321(*o*)(1). This issue was not reached by the court of appeals (see Pet. App. A28-A29 n.6) and is not raised by the petition, and thus it provides no reason for the Court to grant certiorari here.

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